92-619

No. _____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

GEORGE EDWARD PATRICK,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a probation officer who searches a probationer's home without a warrant, without the requisite reasonable suspicion that criminal activity is afoot, and in non-compliance with the suggested regulatory scheme violate the Fourth and Fourteenth Amendments to the United States Constitution?

2. Does a probationer waive his Fourth Amendment Rights when his probation is improperly transferred from one jurisdiction to another?

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GEORGE EDWARD PATRICK,

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VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, George Edward Patrick, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit refusing to suppress from evidence marijuana seized by his probation officer in the search of his home without a search warrant, without reasonable suspicion that criminal activity was going on, and outside of the suggested regulatory scheme the probation officer was to follow.

OPINIONS BELOW

The opinion of the Court of Appeals is not a reported decision. It appears as *United States* v. *Patrick*, and in Appendix A of this Petition. The unpublished written opinion of the District Court for the Eastern District of Kentucky overruling

its' magistrate appears in Appendix B of this Petition. The unpublished recommended ruling of the Magistrate granting Petitioner's Motion to Suppress, later overruled by the District Court for the Eastern District of Kentucky, appears in Appendix C of this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on June 18, 1992. Neither a Petition for Rehearing nor a request that this matter be heard *en banc* were filed. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the United States Constitution is set forth in Appendix D of this Petition.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Kentucky had jurisdiction pursuant to Title 18 U.S.C. § 3231.

On November 28, 1990, Petitioner was arrested by members of the Kentucky State Police. Initially, Petitioner was charged with several violations of Kentucky State law and appeared in court in Pineville, Kentucky for arraignment. On December 10, 1990, however, a criminal complaint was filed in the District Court for the Eastern District of Kentucky charging Petitioner with violations of Title 21 U.S.C § 841(a)(1) and Title 18 U.S.C. § 924(c)(1). On December 17, 1990, following a preliminary and pretrial detention hearing before Magistrate James Cook, Petitioner was bound over to the grand jury and ordered detained.

On December 20, 1990, a three (3) count indictment was returned by the Grand Jury in the Eastern District of Kentucky. Count One charged that Petitioner did possess with intent to distribute a measurable quantity of marijuana in violation of 21 U.S.C. § 841(a)(1). Count Two alleged that Petitioner had been convicted previously of a drug related crime, and that he did knowingly receive three (3) firearms which were shipped and transported in interstate commerce, and did possess said firearms in and effecting commerce in violation of 18 U.S.C. 922(g)(1). Count Three charged that Petitioner did use and carry a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1).

Appellant appeared before Judge Eugene Siler for arraignment on December 26, 1990 and entered a plea of not guilty. On January 8, 1991, Petitioner's counsel filed the first in a series of motions, the most notable of which was a Motion to Suppress Evidence. On February 19, 1991, a hearing was had on the Motion to Suppress before Magistrate J. B. Johnson. In addition to the testimony which was elicited at that hearing, Appellant's counsel provided the Court with both an initial as

well as a Supplemental Memorandum in Support of Motion to Suppress. Upon consideration of the testimony and memorandum, the Magistrate issued his Proposed Findings of Fact and Recommendation on April 15, 1991 sustaining Appellant's Motion to Suppress.

On April 25, 1991, counsel for the Government filed its objection to the Magistrate's Proposed Findings of Fact and Recommendation. On May 24, 1991, Judge Eugene Siler refused to accept the recommendation of the Magistrate and overruled Appellant's Motion to Suppress. On June 24, 1991, Judge Siler issued a Memorandum consistent with his order overruling Petitioner's Motion to Suppress.

On June 24, 1991, a jury trial commenced before Judge Karl Forester sitting in place of Judge Siler. Following a joint motion by the Government and counsel for Petitioner, Count Two was severed from the indictment. It was agreed that Count Three would be re-numbered Count Two, for purpose of the trial. On June 25, 1991, the trial of this matter concluded with the jury returning verdicts of guilty on Counts One and Two.

On August 30, 1991, Appellant was sentenced to eight (8) months on Count One and Sixty (60) months on the re-numbered Count Two. The time on the two counts was ordered to be served consecutively. Appellant was also ordered to submit himself to a term of four (4) years supervised release upon completion of his jail term. Appellant's fines and restitution were waived, but he was assessed $100.00. Subsequently, the Government dismissed the original Count Two of the indictment.

A timely appeal was filed on September 6, 1991. Following the submission of a Motion to Proceed In Forma Pauperis for Purpose of Appeal, the trial court appointed trial counsel for purposes of the appeal.

Petitioner argued before the Court of Appeals for the Sixth Circuit that the evidence obtained by Petitioner's probation

officer in the warrantless search of his residence violated his Fourth Amendment rights because the officer was acting on information that was eight (8) months old, that the probation officer had done nothing to verify the information he had received about Petitioner, that the officer had been to Petitioner's home the same day that he had received the antiquated information and had found nothing amiss, that Petitioner was a model probationer, that the probation officer had not moved expeditiously to complete a search and hence, that the officer acted without the reasonable suspicion required for him to search a probationer's residence.

The Sixth Circuit was unpersuaded by Petitioner's argument and found the probation officer's activities proper.

REASONS FOR GRANTING THE WRIT

I.

CERTITORARI SHOULD BE GRANTED BECAUSE THE COURT BELOW HAS FAILED TO FOLLOW THE DICTATES OF THIS COURT IN *GRIFFIN* V. *WISCONSIN*, 483 U.S. 868 (1987) AND IS IN CONFLICT WITH PREVIOUS DECISIONS OF THAT COURT DEFINING THE STANDARD OF "REASONABLE SUSPICION."

Petitioner signed the Rules of Probation on June 1, 1988. Rule #5 states, "I agree that I will be subject to a search and seizure if my Probation and Parole Officer has *reasonable suspicion* to believe that I may have illegal contraband on my person or property." In *Griffin* v. *Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164 (1987), this Court dealt with the validity of warrantless searches of probationers and/or their homes by Wisconsin probation officers. This Court held that a search pursuant to the Wisconsin regulation was reasonable because the Wisconsin regulatory scheme provided guidance for the probation officer in similar situations. There, in determining whether "reasonable grounds" to search exists, an officer must consider a variety of factors, including information provided by an informant, the reliability and specificity of that information, the informant's reliability, the officer's experience with the probationer, and the need to verify compliance with the rules of probation and with the law. Implicitly, this Court felt these to be reasonable pre-requisites. In addition, the probation officer must also seek the approval of a supervisor before engaging in the search. The Court felt that the "special needs" of the probation system in Wisconsin in regulating its probationers outweighed the needs of the warrant requirement. This justified replacement of the standard of probable cause by "reasonable grounds", as defined by the regulation.

In *Griffin*, there was no question that the reasonable grounds did not exist and had been unfairly applied. The only

question was whether the regulatory search doctrine applied was essential to the overall regulatory scheme involving probationers and parolees. This Court had no difficulty answering that question affirmatively. The matter at bar, however, is significantly different.

Kentucky, unlike Wisconsin, had no regulatory scheme which had been adopted by the legislature at the time of this incident. Administrative regulations had been promulgated to give guidance to a probation officer in making the all important decision of whether to infringe on a probationer's home but they did not go into effect until four (4) months after this search. When read in conjunction with § 10 of the Constitution of the Commonwealth of Kentucky, which states:

> The people shall be safe and secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, not without probable cause supported by oath or affirmation . . .

It is clear that no exception has been carved out by the Kentucky legislature which would allow such an intrusion. It is Petitioner's contention that without such a regulatory scheme in effect, the search is improper. On the other hand, if this Court is inclined to look beyond the existence of a regulatory scheme, it appears that *Griffin* requires that the focus should rest solely on whether the Probation Officer had a legitimate reasonable suspicion. In *Maryland* v. *Buie*, 495 U.S. 325, 110 S.Ct. 1093 (1990), this Court defined reasonable suspicion as a reasonable belief based on "specific and articulable facts" rather than a mere inchoate and unparticularized suspicion or hunch. In *United States* v. *Knox*, 839 F.2d 450 (6th Cir. 1988) and last year in *United States* v. *Anderson, et al.*, 923 F.2d 450 (6th Cir. 1991), the Sixth Circuit held that in determining which suspicions are "reasonable and articulable" courts are directed to consider the totality of the cir-

cumstances, no one of which standing alone would create a reasonable suspicion. That Court went on to say that the "police must demonstrate the existence of an objective as well as a particularized basis for their suspicions." Several years earlier in *United States* v. *Williams*, 754 F.2d 672 (6th Cir. 1985) that court held that a reasonable suspicion is to be based an assessment of *all* circumstances and "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." See also *United States* v. *Tolbert*, 692 F.2d 1047-48 (6th Cir. 1982), *cert. denied*, 104 S.Ct. 337 (1983) quoting *United States* v. *Cortez*, 449 U.S. 411, 418 (1981). In the matter at bar, no circumstances existed warranting reasonable suspicion of Petitioner as a wrongdoer and there was no objective or particularized basis for suspecting him of drug trafficking. In fact, the evidence was all to the contrary.

Various jurisdictions have dealt with similar situations. In *State* v. *Sigler*, 769 P.2d 703 (1989), the Montana Supreme Court followed the lead of the Ninth Circuit in *United States* v. *Duff*, 831 F.2d 176 (9th Cir. 1987). There, they relied on *Griffin* when they found that "the search must be reasonable and must be based on the officer's reasonable belief that it is necessary to the performance of her duties." *Duff*, 831 F.2d at 179. In *State* v. *Lampman*, 724 P.2d 1092 (1986), the Court of Appeals for Washington State held that the standard for determining whether the search of a probationer is reasonable is whether the probation officer has a well-founded suspicion that a probation violation has occurred. The Supreme Court for the State of Hawaii in *State* v. *Fields*, 686 P.2d 1379 (1984) advocated a case by case analysis. In *United States* v. *Schoenrock*, 868 F.2d 289 (8th Cir. 1989), the Eighth Circuit Court of Appeals had no difficulty approving the warrantless search of Schoenrock's residence because the probation officers were experiencing difficulties with Schoenrock's supervision. He had submitted a urine sample that had been diluted with water. Later samples revealed the presence of marijuana. Schoenrock had also been arrested for

smuggling marijuana into the work release facility in which he had been placed. He failed to complete the aftercare program which was a condition of his probation. Schoenrock was also perceived to be dishonest with his family counselor and evasive about his living arrangements. These well founded circumstances clearly allowed for the search of Schoenrock's residence.

In *United States* v. *Giannetta*, 909 F.2d 571 (1st Cir. 1990), the probation officer faced a situation similar to Schoenrock. Giannetta had repeatedly violated certain terms of his probation. He had taken unauthorized trips, been in contact with convicted felons, filed a false loan application and had been involved in credit card fraud. These activities, along with other assembled information, resulted in the search. This evidence clearly provided reasonable suspicion sufficient to warrant the search.

Following *Griffin*, the Supreme Judicial Court for the State of Massachusetts in *Commonwealth* v. *LaFrance*, 402 Mass. 789, 525 N.E.2d 379 (1988) held that:

> "Reasonable grounds" or "reasonable suspicion" of wrongdoing, justifying the search of probationer or probationer's premises, depends on the circumstances of each case, including terms of probation, the nature of information on which the probation officer relies in deciding that a probation violation is reasonably suspected, the extent to which persons other than probationer would have their privacy invaded, and the extent to which less intrusive means that search would fulfill the needs of the probation officer."

Two other circuits have dealt with this situation in different ways. The Fifth Circuit in *United States* v. *Scott*, 678 F.2d 35 (5th Cir. 1982) expressly adopted the approach of *Terry* v. *Ohio*, 393 U.S. 1 (1968) in governing the searches of probationers. The Fourth Circuit in *United States* v. *Brandley*, 571 F.2d 787 (4th Cir. 1978), held that "articulable grounds" must be advanced.

Under none of the positions cited above would the search of Petitioner's residence have been permissible. Clearly, the probation officer did not have a "reasonable suspicion."

II.

4 U.S.C. § 112, Compacts between States for Cooperation in prevention of crime; Consent of Congress, states in subsection (a) the following:

> The Consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.

In response to this, the Interstate Compact as to Parolees and Probationers was promulgated. Ohio Revised Code § 5149.17 and Kentucky Statute 439.560 are the state corollaries to this statute. The purpose of the Compact is to set up rules and regulations for the orderly transfer of parolees and probationers to other jurisdictions whenever the need may arise. The Compact also seeks to establish the manner of supervision and procedures which are to be followed to return violators back to the "sending state" without the intervention of extradition hearings. The Compact authorizes only the duly appointed judicial *and* administrative authorities to permit an individual convicted of an offense and placed on probation to have their supervision handled by the state of their residence. This is a permissible procedure and must be approved by the judge, the probation department of the sentencing court, and the probation department of the receiving state. It is not an either/or proposition.

In Ohio, it has long been the rule that courts speak only through their judgment entries. *State of Ohio* v. *Tripodo*, 50

O.S.2d 124, 363 N.E. 2d 179 (1977). Furthermore, Ohio Rule of Criminal Procedure 32(B) states the following:

> A judgment of conviction shall set forth the plea, the verdict or findings and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

Ohio Rule of Criminal Procedure 55 directs the clerks of court in the manner in which they are to enter all judgments. In pertinent part, the rule states:

> (A) *Criminal Appearance Docket.* The Clerk shall keep a criminal appearance docket. Upon the commencement of a criminal action the clerk shall assign each action a number. This number shall be placed on the first page, and every continuation page, of the appearance docket which concerns the particular action. In addition, this number and the names of the paries shall be placed on the case file and every paper filed in the action.
>
> At the time the action is commenced the clerk shall enter in the appearance docket the names, except as provided in Rule 6(E), of the parties in full, the names of counsel and index the action by the name of the defendant. Thereafter, the clerk shall chronologically note in the appearance docket all: process issued and returns, pleas and motions, papers filed in the action, orders, verdicts and judgments. The notations shall be brief but shall show the date of filing and the substance of each order, verdict and judgment.

Federal Rule of Criminal Procedure 32 (b) has the same requirements. The principle purpose of this rule is to provide finality. Only with an entry signed by a judge, entered by a clerk in compliance with both Federal and Ohio Rule of Criminal Procedure 55, can finality for the purpose of appeal

or some other challenge exist. See *United States* v. *Batista*, 418 F.2d 572 (3rd Cir. 1969), *cert. denied*, 397 U.S. 1054 (1970) in which the court held that there was no judgment of conviction ever entered, and any attempt to appeal would have been void. In *Hill* v. *United States ex rel. Wamplor*, 298 U.S. 460, 56 S.Ct. 750 (1936), the Supreme Court held that "the only sentence known to the law is the sentence or judgment entered upon the records of the Court."

In the matter at bar, Petitioner was originally placed on probation in Hamilton County, Cincinnati, Ohio. A certified copy of the criminal docket in Hamilton County Court of Common Pleas Case No. B-875208 reveals that there is no signed judgment entry docketed which authorized transfer of Appellant's probation to the State of Kentucky. Furthermore, the actual Judgment Entry which memorialized the sentence made no reference to the transfer of Appellant's probationary status to the State of Kentucky. Without the appropriate order of the Court authorizing the transfer of this Appellant's probationary supervision to the State of Kentucky, the transfer was improper. The importance here is the fact that the probationary rules in Cincinnati, Ohio, the sending jurisdiction, do not require a Petitioner to waive his Fourth Amendment rights as Kentucky does.

CONCLUSION

For all the reasons herein set forth, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals in this matter.

DATED: September 10, 1992.

Respectfully submitted,

HAL R. ARENSTEIN
Attorney for Petitioner

APPENDIX A

NOT RECOMMEDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is reproduced.*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No.: 91-6061

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GEORGE EDWARD PATRICK,
Defendant-Appellant.

ORDER

(Filed June 18, 1992)

BEFORE: MERRITT, Chief Judge; MILBURN, Circuit Judge; and PECK, Senior Circuit Judge.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN,
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CRIMINAL NO. 90-50

UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

GEORGE PATRICK,
DEFENDANT.

MEMORANDUM

(Filed May 24 1991)

The Magistrate Judge having filed his proposed findings of fact and recommendation on April 15, 1991, and the United States having filed its objections thereto, the Court hereby considers de novo any matters which were objected to.

The Court adopts all those findings by the Magistrate Judge for which there were no objections. The Court does, however, sustain some of the objections to the extent they are consistent with this memorandum. It also overrules the proposed findings of fact and recommendation insofar as they may be inconsistent with this memorandum.

First, although the probation officer had in mind a search when he went to the home of the defendant, nevertheless he had full authority to enter upon the premises under the conditions of probation. Otherwise, it would be impractical and unwise for the law to require a probation officer to obtain a warrant anytime he goes to the home of the defendant. When he has information, stale or not, that the defendant may be in violation of conditions of his probation, he not only had the

authority, but the obligation, to check out the matter. He was fully justified in being accompanied by a member of the Kentucky State Police, if he thought there was any chance for potential violence.

Once the probation officer entered the home, when he saw the firearm in plain view, it was apparent that the defendant was in violation of the law as being a convicted felon in possession of a firearm. The probation officer also found another handgun and large sum of cash in the kitchen and heard a flushing sound from the bathroom. Thereafter, the probation officer saw the defendant with what appeared to be marijuana residue on his hands. At that point, the probation officer had a right to proceed into the bathroom from where the flushing sound eminated, and discovered marijuana in the toilet and bathtub.

Once the officers discovered that the defendant was in violation of the law by possessing the firearm and the marijuana, they had a right to further conduct the search of the house and find the additional marijuana, weapon and a large sum of cash.

This Court does not consider that the act of the probation officer was a "search" at all, initially, inasmuch as he had the right to make home visits to the defendant at any time. It was only after he discovered the contraband in open view that he conducted the search under exigent circumstances, inasmuch as he had already observed the defendant's attempting to destroy some of the evidence.

Therefore, that part of the recommendation which asserts that the motion to suppress should be sustained, be and is vacated.

This 24 day of May, 1991.

/s/ EUGENE E. SILER, JR.
CHIEF JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CRIMINAL NO. 90-50

UNITED STATES OF AMERICA,
PLAINTIFF,

VS.

GEORGE PATRICK,
DEFENDANT.

PROPOSED FINDINGS OF FACT AND RECOMMENDATION

(Filed April 15, 1991)

This matter was assigned to the undersigned United States Magistrate Judge upon the defendant's Motion to Suppress any and all evidence seized from his residence located on Long Branch Road in Arjay, Kentucky on November 28, 1990. A hearing was held on February 19, 1991 at which the defendant was present in person and by counsel, and the United States was represented by Assistant United States Attorney, R. Michael Murphy. The evidence at said hearing was personally heard by the undersigned Magistrate Judge, who, having read and considered the entire record and further considered oral argument of counsel and the written briefs, makes the following proposed Findings of Fact and Recommendation:

FINDINGS OF FACT

1) Denny Compston is the Probation and Parole Officer for the 44th Judicial Circuit of Kentucky, which consists of

Bell County. The defendant's residence in Arjay is located within that County and within the Eastern District of Kentucky.

2) At all times relevant herein, the defendant was a convicted felon and was under active supervision by Compston. Pursuant to this supervision Compston had visited Patrick's home on November 27, 1990 and had found "nothing wrong". On returning to his office at the Bell County Courthouse, Compston had a conversation with Vickie Bailey, Official Court Reporter for Bell Circuit Court, who informed Compston that on that date one Chester Bailey had stated in open court that the "dope and weapons" referred to in his (Bailey's) indictment had come from this defendant, George Patrick. Bailey's indictment referred to an incident which occurred in March of 1990.

3) Compston spoke with Walter Cashen, Jr., a Kentucky State Police Detective, and asked Cashen to go with him the following day to Patrick's house so he could check out this information. Compston also called his supervisor and sought advice on how to handle the situation. Compston admitted at the hearing that "in the back of my mind I had it that I might conduct a search". Compston based this on a provision (No. 5) which was included in the defendant's "Conditions of Supervision" dated June 1, 1988:

> "I agree that I may be subject to a search and seizure if my Probation and Parole Officer has reasonable suspicion to believe that I may have illegal contraband on my person or property."

4) On the following day (November 28, 1990) at approximately 4:30 p.m., Compston, accompanied by Kentucky State Police Detective Cashen, a Trooper Pingleton, and a canine unit went to Patrick's residence on Long Branch Road. They observed nothing illegal before entering the house. They had not obtained a search warrant.

5) A person named Leon Lewis answered their knock at the door. They asked Lewis if George Patrick was there and

Lewis stepped back and advised them that Patrick was in the back part of the house in the tanning bed. Compston and Detective Cashen entered and Compston immediately noticed a handgun lying on the kitchen table, which he testified was a violation of another provision of the defendant's Conditions of Supervision and also violated both Federal and State law prohibiting a convicted felon from having in his possession a firearm. Moving further through the kitchen area they noted another handgun and a large sum of cash on top of the refrigerator. About this same time, the officers heard a flushing sound coming from the bathroom and Patrick was then observed with water and what appeared to be marijuana residue on his hands. The officers entered the bathroom and found several ounces of marijuana in both the toilet and bathtub. It appeared to them that someone had tried to flush the marijuana down the toilet and bathtub drains. Thereupon, Patrick was arrested.

6) The search then proceeded to other areas of Patricks home, including the attached garage, containing a vehicle, and more marijuana, along with another weapon and one hundred sixty thousand ($160,000) dollars in cash were found and seized.

RECOMMENDATION

The United States expressly does not contend that the warrantless search and seizure can be justified as incident to a lawful arrest. Rather, it contends that a full search of the defendant's residence was authorized by his consent to abide by the "Conditions of Supervision" executed on June 1, 1988, which was in full force and effect on the day in question.

The leading case on the right of a probation officer to search his client's property is *Griffin* v. *Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164 (1987). The Supreme Court upheld a probation officer's search pursuant to a Wisconsin regulation which allowed such searches where there are "reasonable grounds" to search. The Court expressly declined to decide whether *any* search of a probationer's home by a probation

officer is lawful when there are "reasonable grounds" to believe contraband is present. The Court emphasized that the Wisconsin Supreme Court — the ultimate authority on issues of Wisconsin law — had held that a tip from a police detective that Griffin "had" or "may have had" an illegal weapon at his home constituted the requisite "reasonable grounds".

The defendant contents that *Griffin* is inapplicable because "Kentucky, unlike Wisconsin, has no regulatory scheme which sets down the standards to be followed by its probation officers." He further contents that "no administrative regulations have ever been promulgated." This is incorrect. The Commonwealth of Kentucky, Department of Corrections, promulgated Policies and Procedures (Policy No. 27-16-01) effective May 8, 1989. This policy is very similar to the quoted provisions of the Wisconsin regulation except that it sets out a "reasonable suspicion" standard rather than the "reasonable grounds" standard utilized in Wisconsin. This Court sees no effective difference between the two standards.

The Court therefore concludes that the Kentucky policy would be upheld on the same grounds that the Wisconsin regulation was upheld in *Griffin* v. *Wisconsin*, *supra*. However, there are at least two problems with its application under the facts of this case.

First, the Kentucky policy itself provides that a search warrant should be obtained unless "exigent or emergency circumstances exists". Here, there is no showing of an exigency or emergency and in fact the probation officer did not search until more than twenty-four hours after receiving his tip. Secondly, and more importantly, the information upon which he relied was stale. There is no way information eight months old could be held by any court to constitute "reasonable suspicion," "reasonable grounds" or "probable cause". Regardless of the standard used, it seems patent that to constitute that standard the information must not be stale. The Supreme Court of Kentucky has addressed this issue (admittedly in discussing probable cause for a warrant) on at least two occasions. In *Bentley* v. *Commonwealth*, 239 Ky. 122, 38 S.W.2d 963 (1931) the Court held that while it is not necessary that

the precise date of the occurrence of the necessary facts should be given by the affiant, the facts should have been so near in point of time to the making of the affidavit and the issuance of the search warrant as to create a reasonable belief that the same conditions described in the affidavit still prevail. The *Bently* case was followed in *Owens* v. *Commonwealth*, 309 Ky. 478, 218 S.W.2d 49 (1949).

Thus, just as the Supreme Court of the United States relied upon the Supreme Court of Wisconsin's holdings in upholding the search in *Griffin* v. *Wisconsin*, *supra*, we feel that this Court must rely upon the Supreme Court of Kentucky's rule that the information relied upon must be "so near in point of time . . . to create the reasonable belief that the same conditions . . . still prevail." Obviously information eight months old does not meet the Kentucky test and, resultingly, the search and seizure must fail.

IT IS THEREFORE RECOMMENDED that the Motion to Suppress be *SUSTAINED*.

This 15th day of April, 1991.

/s/ J.B. JOHNSON, JR.
U.S. MAGISTRATE JUDGE

APPENDIX D

AMENDMENT IV TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, an no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.